IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

Crl.Rev.Pet.No. 2455 of 2007()

AGAINST THE ORDER DATED 08/06/2007 IN CRMP 2439/2007 IN SC.455/2003 of SPL.COURT SPE/CBI-II & IV ADDL.SESSIONS COURT, ERNAKULAM

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REVN. PETITIONER: ACCUSED NO.3

P.VIJAYAN IPS,
DGP, KERALA POLICE(RETIRED),
S/O LATE DR. P.SHEKHARAN,
THRIVANI, THAVAKKARA,
KANOOR, KERALA.

BY ADV. SRI.V.V.RAJA
SRI.R.RENJITH
SRI.M.T.SURESH KUMAR

RESPONDENTS: COMPLAINANT AND STATE

1. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM.

2. THE INSPECTOR,
CBI-SIC.II, NEW DELHI,
REPRESENTED BY ITS RETAINER COUNSEL.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR
DIRECTOR GENERAL OF PROSECUTION SRI. P.G. THAMBI

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 26-06-2007, THE COURT ON 4-7-2007 PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. R.P. No. 2455 of 2007

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Dated, this the 4th day of July 2007

ORDER

In this revision filed under Section 397 read with Sec. 401 Cr.P.C., the petitioner who is the 3rd accused in S.C. 455 of 2003 on the file of the IV Addl. Sessions Court, (Court of Special Judge SPE/CBI-II), Ernakulam assails the order dated 8-6-2007 passed by the Special Judge dismissing Crl.M.P. 2439 of 2007 filed by the petitioner herein seeking his discharge under Sec. 227 Cr.P.C.

2. I heard Advocate Sri. Raja Vijayaraghavan, the learned counsel appearing for the revision petitioner, Sri. P.G. Thambi, the learned Director General of Prosecutions and Sri. S. Sreekumar, the learned Standing Counsel for the C.B.I.

ARGUMENTS FOR DISCHARGE

3. The learned counsel appearing for the revision petitioner made the following submissions before me in support of the revision:-

The prosecution case is that one Naxalite Varghese who was allegedly killed in a police encounter on 18-2-1970 was shot dead by the first accused, a C.R.P.F. Constable by name

Ramachandran Nair who is now no more and that the said Ramachandran Nair was given orders to shoot Naxalite Varghese by the then DySP, Lakshmana and the then DIG Northern Range, P. Vijayan (the petitioner herein) who had questioned Naxalite Varghese from the Thirunelli forest area. An affidaivit filed by deceased first accused as the 4th respondent in a Writ Petition filed before this court admitting that he fired the fatal shot at Naxalite Varghese, an extra judicial confession of the said first accused and taken down by C.W.32 (Jayadevan -a police constable and a friend of the first accused), the 161 statement of the said C.W.32, the statement of C.W.21 (Muhammed Haneefa), a CRPF Constable who is alleged to have been present with A1 at the time of incident, the statement of C.W.31 to whom A1 is alleged to have disclosed the incident of the fake encounter and the statement of C.W.6 (Vasu, a Naxalite) to whom A1 is alleged to have disclosed the fake encounter are inter alia the materials relied on by the prosecution to rope in the petitioner. A close reading of the 161 statements of the aforementioned witnesses would not reveal the presence or participation of the petitioner herein. There is nothing in their statements even to suggest

the presence of the petitioner herein in the Thirunelli forest area on 18-2-1970 when Naxalite Varghese was allegedly shot dead. The affidavit allegedly sworn to by the first accused also does not implicate the petitioner herein. Even if it does, it is the weekest piece of evidence which cannot be relied on unless corroborated in material particulars. Moreover, since the first accused is no more, there is no question of his confession being relied on as a piece of evidence against the petitioner herein because it is now impossible for the prosecution to jointly try the first accused along with the petitioner herein in which case alone the confession of the first accused becomes admissible under Sec. 30 of the Evidence Act. That apart, such a confession by a co-accused is a very week piece of evidence. Moreover, the affidavit furnished by the first accused was the basis of which the police registered the crime and therefore, it is the first information statement in the case. Such a statement is not a substantive piece of evidence and can be used only to corroborate the statement of the maker or to contradict him provided the maker is alive. Here, the maker is not only not alive, but also was made an accused in the case and, therefore, no useful purpose could be derived from the

said affidavit. A trial on such material will be an exercise in futility. The leaned Judge while considering the question of framing the charge under Sec. 227 Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding to trial. The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. However, if two views are equally possible and the judge is satisfied that the evidence produced before him only gives rise to some suspicion but not grave suspicion against the accused then the judge would be fully within his right in discharging the accused . ***(Vide AIR 1979 SC 306 - Union of India v. Praffulla Kumar Samal).*** The petitioner who filed Crl. M.P. 2439/07 before the Special Judge for a discharge has been visited with the impugned one line cryptic order to the effect that since charge has been ordered to be framed for the offence

punishable under Sec. 302 I.P.C., the discharge petition is dismissed. Such an order is per se illegal and unsustainable especially when the matter was argued before the Special Judge for more than 3 days.

STAND OF THE STATE

4. Sri.P.G. Thampi, the learned Director General of Prosecutions submitted that the impugned order is ex facie unsustainable since it is only on arriving at the requisite satisfaction that there is sufficient ground for proceeding against the accused, can be judge decide to frame the charge.

JUDICIAL EVALUATION

5. I am afraid that I cannot agree with the above submissions. The case of the prosecution is that on 18-2-1970 at about 6.55 p.m. inside the dense forest at Thirunelli, an alleged naxalite by name Varghese was shot dead by deceased first accused (Ramachandran Nair) in a fake police encounter allegedly under instructions from the 2nd accused Lakshmana who was the then Dy.S.P., Thlassery and the 3rd accused Vijayan (the petitioner herein who was the Deputy Inspector General of Police, Northern Range, Kerala. The case was registered on 3-3-1999 at

11.30 a.m. as per the directions of this court before which the first accused Ramachandran Nair who was the 4th respondent in O.P. No. 21722 of 1998 and connected Original Petitions had filed an affidavit disclosing the complicity of himself and accused Nos. 2 and 3 in the brutal murder of Varghese. the case was investigated by the C.B.I. and final report was laid before the Special Court (SPE/CBI-II), (IV Additional Sessions Court), Ernakulam on 11-12-2002 for an offence punishable under Sec. 302 read with Sec. 34 I.P.C. against accused Nos. 1 to 3. The first accused Ramachandran Nair died, thereafter.

6. The petitioner herein who is the 3rd accused filed **Crl. M.P. 2439 of 2007** before the Special Judge seeking his discharge. The said petition after detailed hearing under Sec. 227 Cr.P.C. was dismissed as per the impugned order dated 8-6-2007 on the ground that a charge has already been ordered to be framed for the offence of murder punishable under Sec. 302 read with Sec. 34 I.P.C. It is the said order which is assailed in this Revision filed by the 3rd accused.

7. Sec. 227 Cr.P.C. reads as follows:

> **227**. Discharge:- If, upon consideration of the record of the case and the documents submitted therewith, and

> after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing".

As per the above provision after considering the records of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution if the Judge finds that there is no sufficient ground for proceeding against the accused, then he has to discharge the accused and while doing so, he has to record his reasons for such discharge. Section 228 Cr.P.C. occurs after Section 227. Sub-section (1) of Sec. 228 Cr.P.C. provides that if after such consideration and hearing as aforesaid the judge is of the opinion that there is ground for presuming that the accused has committed the offence, then he may frame charge against the accused. unlike Sec. 227 Cr.P.C., Sec. 228 does not oblige the court to give reasons while framing charge. Obviously, the insistence on the duty to give reasons while discharging the accused under Sec. 227 Cr.P.C. is because of the premature termination of the proceedings by the court. But if the court, instead of discharging the accused under Sec. 227 Cr.P.C., proceeds under Sec. 228 Cr.P.C. to the subsequent

stage of framing charge, the court is not prematurely terminating the proceedings. That explains why no reasons need be given while framing charge in contra distinction to the duty to give reasons while discharging the accused. No doubt, while exercising the jurisdiction under Sec. 227 Cr.P.C. the court cannot act merely as a post office or the mouth piece of the prosecution but has to consider the broad probabilities of the case, the cumulative effect of the evidence and the documents produced by the prosecution and any vital infirmity in the case of the prosecution and so on. This, However, does not mean that the judge should make a roving enquiry into the *pros and cons* of the matter and weigh the evidence as if he were conducting a trial. While considering the question of framing of charge under Sec. 227 Cr.P.C. the Judge has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a ***prima facie*** case against the accused has been made out. The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. Where the materials placed before the court disclose a grave suspicion and not some suspicion

against the accused and which has not been properly explained, the court will be fully justified in framing a charge and proceed with the trial. ***(See Almohan Das v. State of M.P. - AIR 1970 S.C. 863, K.P. Raghavan v. M.H. Abbas – AIR 1967 S.C. 740, State of Bihar v. Ramesh Singh – 1977 SCC Crl. 533, Union of India v. Praffulla Kumar Samal and Anr. - 1979 (3) SCC 4. In Kanti Bhadra Shah and Anr. v. State of West Bengal – 2000 (1) SCC 722*** interpreting the corresponding provisions for warrant trial under Sections 239 and 240 Cr.P.C. the Apex court observed as follows:

> "It is pertinent to note that this Section required a Magistrate to record his reasons for discharging the accused but there is no such requirement if he forms the opinion that there is ground for presuming that the accused had committed the offence which he is competent to try. In such a situation he is only r*equired to frame a charge* in writing against the accused".

In paragraph 11 of the said decision the Apex Court observed that in a Sessions trial also the legal position is the same. This is what the Court observed:-

> "In this contest it is pertinent to point out that even in a trial before a Court of Session, the Judge is required to record reasons only if he decides to discharge the accused (vide Section 227 of the Code).

> But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge".

The following observations obtained at paragraph 12 of the above decisions are very apposite.

> "If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. **If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial.** It is a salutary guideline that when orders rejecting or granting bail are passed, the court should avoid expressing one way or the other on contentious

> issues, except in cases such as those falling within Section 37 of the Narcotic Drugs and Psychotropic substances Act, 1985".
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> (emphasis supplied)

Again in **State of M.P. v. S.B. Johari - AIR 2000 SC 666**, the Supreme Court observed as follows:

> "From the reasons recorded by the High Court, it appears that instead of considering the prima facie case, the High court has appreciated and weighed the materials on record for coming to the conclusion that charge against the respondents could not have been framed. **It is settled law that at the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed.** The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that accused committed the particular offence. In such case there would be no

sufficient ground for proceeding with the trial. In **Niranjan Singh Karam Singh Punjabi etc. v. Jitendra Bhimraj Bijayya etc., reported in (1990) 4 SCC 76; (AIR 1990 SC 1962: 1990 Crl.L.J. 1869),** after considering the provisions of Ss. 227 and 228, Cr. P.C. Court posed a question whether at the stage of framing the charge, trial court should marshal the materials on the record of the case as he would do on the conclusion of the trial ? The Court held that at the stage of framing the charge inquiry must necessarily be limited to deciding if the facts emerging from such materials constitute the offence with which the accused could be charged. **The Court may peruse the records for that limited purpose, but it is not required to marshal with a view to decide the reliability thereof.** The Court referred to earlier decisions in State of Bihar v. Ramesh Singh (1977) 4 SCC 39; (AIR 1977 SC 2018: 1977 Crl.L.J. 1606). Union of India v. Prafulla Kumar Samal (1979) 3 SCC 4: (AIR 1979 SC 366: 1979 Crl.L.J. 154) and Supdt. of Remembrancer of Legal Affairs, West Bengal v. anil Kumar Bhunja (1979) 4 SCC 274: (AIR 1980 SC 52: 1979 Crl.L.J. 1390, and held thus:-

From the above discussion it seems well settled that at the Ss. 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom **taken at their face**

> **value disclose the existence of all the ingredients constituting the alleged offence.** The Court may for this limited purpose sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense of the broad probabilities of the case".
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> (emphasis supplied)

Recently the Apex Court in **Lalu Prasad V. State of Bihar – 2007 (1) SCC 49** has summarised the position thus:

> "The question relating to forming of an opinion at the time of framing of charge is different from a case of recording of reasons on the basis of which an order of discharge of the accused may be passed. The moment the order of discharge is passed it is imperative to record the reasons. But for framing of charge the court is required to form an opinion that there *is ground for presuming* that the accused has committed the offence. in case of discharge of the accused the use of the expression "reasons" has been inserted in Sections 227, 239 and 245 Cr.P.C. At the stage of framing of a charge the expression used is "opinion". The reason is obvious. If the reasons are recorded in case of framing of charge, there is likelihood of prejudicing the case of the accused put on trial. **The Judge is required to records reasons only**

> **if he decides to discharge the accused. But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge.** But where the question of jurisdiction is raised and the trial court is required to adjudicate that issue, it cannot be said that reasons are not to be recorded. In such a case reasons relate to question of jurisdiction and not necessarily to the issue relating to framing of charge. in such a case reasons dealing with a plea relating to jurisdiction have to be recorded".
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> (emphasis supplied)

8. The special Judge was thus fully justified in dismissing the petition for discharge filed by the petitioner herein, since after evaluating the materials produced by the prosecution and after considering the broad probabilities of the case he was satisfied about the existence of a **prima facie case** against the petitioner and others. Going by the averments in the affidavit filed by the first accused Ramachandran Nair and which constituted the first information in the case, deceased Varghese was detected by the police in a hut inside the thickets of Thirunelli forest and was caught and held a captive in the police camp. Both the eyes of Varghese were tied with a piece of

cloth and he was taken into the wilderness of the forest. Both accused Nos. 2 and 3 questioned Varghese. Since Varghese was negative giving negative answers to the volley of questions put to him by A2 and A3 , A2 is alleged to have threatened him by saying that if he did not reveal the truth he would not see the next morning. Thereafter, A2 and A3 called the C.R.P. F. Constables to their side and A2 asked them as to who will shoot Varghese to death. Two of the Constables in the company of A1 expressed their willingness to shoot Varghese. Another Constable reluctantly expressed his willingness to shoot the deceased. A1 did not express his willingness to shoot Varghese . Then, A2 asked A1 whether he could not do that job and intimidated him that if he did not oblige that he also will be killed in the naxalite action. Sensing danger to his life A1 at last fired the shot at 6.55 p.m. on 18-2-1970 by shooting Varghese on his left chest. Besides the extra judicial confession of A1 to C.W. 31 (Velayudhan) a Police Constable at Calicut and reduced to writing by C.W.32 (Jayadevan, a Constable in the Malabar Special Police) the prosecution also relies on the statement of C.W.6, (Vasu) a noted naxalite, to whom also A1

is alleged to have disclosed the fake encounter in which Varghese was done to death in cold blood, the statement of C.W.21 (Muhammed Haneefa) a Constable of C.R.P.F. who was allegedly present with A1 at the time of incident.

9. No doubt, A1 who allegedly fired the lethal gun shot at Varghese has subsequently died. The question as to whether his extra-judicial confession has any other material to corroborate and the further question as to the long silence on the part of the prosecution witnesses in not revealing to anybody about the fake encounter etc. are matters to be proved after trial.

10. It is too early to predict or predicate that the trial in this case will be an exercise in futility or a meaningless and wasteful ritual. The affidavit sworn to and the extra judicial confessions allegedly made by deceased 1st accused cannot be eschewed or discarded as worthless shreds of evidence. Their probative value, admissibility, reliability etc. are matters for evaluation after trial. Similarly, there are discernible reasons for the long silence on the part of the 1st accused and similarly situated tainted souls. A police superior doesn't have to be a

demon or a martinet to instill fear in the minds of those at the lower rungs of the constabulary to coerce them against disclosing the facts of a diabolical crime in which such subordinates were also active or passive accomplices. How far the reasons furnished in support of the belated disclosures will stand the scrutiny of the court is also a matter which can come into focus only after the trial. If the killing of Varghese was not a sheer accident in an unexpected police encounter, but the outcome of a sinister design in the warped mind of a couple of senior police officers who considered Varghese to be a chronic eyesore and a perpetual menace, then the law in this country is, and ought to be, mighty enough and powerful enough to reach them. The transformation of the custodians of law into perpetrators of crime is an evil which no civilised society can tolerate. If it was a man-hunt culminating in the cold blooded assassination of the captive after blind folding him and if the story of encounter which the whole world was made to believe, was really a subterfuge or a canard, our system should be able to penetrate the fortress of falsehood and expose the truth and bring the guilty to justice, no matter whether decades have rolled by in the meanwhile. If such

be the case, the spectre of Varghese will certainly strengthen the arms of law to vindicate the injustice. In a country where the rule of law is supreme and Courts exist for doing justice to the mankind and the truth can be unravelled through an impartial, blemishless and faultless investigation, then a criminal trial alone is the answer to chastise the delinquents. I fail to see how such a trial can be an ordeal or trauma for those against whom a prima facie case has been made out.

In view of the foregoing discussion, I see no ground to interfere with the order passed by the trial Judge dismissing the discharge petition filed by A3. This Revision is accordingly dismissed.

V. RAMKUMAR,
(JUDGE)

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